

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1997

February 19, 1998

Cecil Crowson, Jr.

Appellate Court Clerk

FILED

RANDALL LAY,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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C.C.A. NO. 03C01-9702-CR-00071

KNOX COUNTY

HON. RICHARD BAUMGARTNER
JUDGE

(Post-Conviction)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF KNOX COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Petitioner, Randall Lay, appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure from the trial court's denial of his petition for post-conviction relief. On March 19, 1993, the Petitioner pleaded guilty to especially aggravated robbery.¹ As specified in the negotiated plea agreement, he was sentenced to fifteen years imprisonment as a Range I, standard offender. His sentence was ordered to run consecutively to a three-year sentence he was serving at the time of the offense. He filed a pro se petition for post-conviction relief on January 24, 1995, which was amended with the assistance of counsel on October 26, 1995. In his petition for post-conviction relief, the Petitioner argues that he was denied effective assistance of counsel at his guilty plea proceeding for a number of reasons. The trial court conducted an evidentiary hearing on December 16, 1996, and after considering the evidence, denied the petition. We affirm the judgment of the trial court.

The record indicates that the offense occurred on September 23, 1992. The Petitioner was a passenger in the car which the victim was driving, along with a mutual friend of the two individuals. It appears that the Petitioner knew the victim only through their mutual friend. The victim dropped off the mutual friend, leaving himself and the Petitioner in the vehicle. The Petitioner later struck the victim in the head with a bottle, beat him, threw him from the vehicle and drove away in the victim's car. The Petitioner was subsequently apprehended after a

¹Tenn. Code Ann. § 39-13-403.

police chase, during which he wrecked the victim's car. He apparently made a statement to police implicating himself in the beating of the victim.

On January 24, 1995, the Petitioner filed a pro se petition for post-conviction relief, arguing that defense counsel at the guilty plea proceeding was ineffective. Counsel was appointed and amended the petition on October 26, 1995. Through the amended petition, the Petitioner argued that his attorney at the guilty plea proceeding, Julia Auer, rendered ineffective assistance of counsel in several ways:

- (1) That counsel failed to file a motion for discovery or a motion to suppress his statement to police;
- (2) that counsel failed to investigate the medical condition of the victim and, in particular, whether the victim had suffered "serious bodily injury" as required for especially aggravated robbery;² and,
- (3) that counsel failed to communicate with him adequately.

The Petitioner asserted that had defense counsel fully investigated the case and properly advised him regarding the requirements of the State's proof, he would have proceeded to trial.

The trial court conducted an evidentiary hearing on the petition for post-conviction relief on December 16, 1996. At the hearing, the Petitioner testified that he was not guilty of the offense but pleaded guilty because defense counsel informed him that if he went to trial, he would receive an effective sentence of thirty-five years. It appears that at the time of the offense, the Petitioner was serving an alternative sentence of three years for a theft conviction. The alternative sentence was being served in the Community Alternative to Prison

² See Tenn. Code Ann. § 39-13-403(a)(2).

Program ("CAPP"). According to the Petitioner, defense counsel told him that if he proceeded to trial, he would receive twenty-five years for the especially aggravated robbery and his CAPP sentence would be revoked and increased to ten years. As a result, he felt as if he had no choice but to take the negotiated plea agreement which would result in a lesser sentence.

From his recollection, the Petitioner recalled defense counsel visiting him in jail only once. He testified that defense counsel asked him if he had committed the crime, if he had an alibi or any witnesses, and if he knew of any witnesses on behalf of the victim. Defense counsel did not ask about the circumstances of the offense and did not discuss what the State would have to prove to sustain a conviction. The Petitioner stated that he specifically asked defense counsel to file a motion for discovery, but she refused, saying that he was going to be convicted either way. The Petitioner also asked defense counsel to file a motion to suppress his statement to police. He did not know if defense counsel had done so.

On cross-examination, the Petitioner admitted that he was arrested for the especially aggravated robbery three days after he had been placed on the CAPP sentence. He also admitted that the arresting officer testified at the preliminary hearing that he had confessed to striking the victim with a beer bottle. The Petitioner, however, maintained that he had not confessed to the officer. He testified that he was aware that the fifteen year sentence was the minimum for especially aggravated robbery, but he initially believed he was charged only with aggravated robbery, which carried an eight to twelve year sentencing range. Furthermore, the Petitioner testified that he knew that the extent of the victim's

injuries was severe because they stayed in adjoining hospital rooms after the Petitioner had wrecked the victim's car.

With regard to his actions during the commission of the offense, the Petitioner testified that the victim had pulled over behind a housing project and "got to running his mouth to some individuals." These individuals assaulted the victim, who fled the scene on foot, leaving the Petitioner in the car. The Petitioner then drove away. He saw the victim being beaten, but stated that he did not know the perpetrator. The Petitioner did admit that he knew of no witnesses he could have called had he proceeded to trial.

The only other witness to testify at the post-conviction hearing was the Petitioner's attorney from the guilty plea proceeding, Julia Auer. Auer testified that she graduated from law school in 1990 and was a member of the Knoxville Public Defender's Office. She represented the Petitioner on the theft charge which resulted in his three-year CAPP sentence. At sentencing for that conviction, the trial judge informed the Petitioner that he had the authority to increase the actual sentence should there ever be cause to revoke it. Auer confirmed that the Petitioner was arrested for especially aggravated robbery three days after being placed on the CAPP sentence. This circumstance, coupled with the violent nature of the robbery, made Auer suspect that the trial court would revoke the Petitioner's CAPP sentence and increase the term.

Auer testified that she did discuss the facts of the case with the Petitioner. According to Auer, the Petitioner made it clear to her that he was involved in the robbery. The evidence against the Petitioner was strong in her opinion. She had

no doubt that the Petitioner could be convicted of aggravated robbery. Initially she had concerns that the facts of the case might not amount to especially aggravated robbery because she was unsure whether a beer bottle could be considered a “deadly weapon.” Further research on this issue convinced her that a beer bottle could qualify as a “deadly weapon” for purposes of especially aggravated robbery if used in a particular fashion. See Tenn. Code Ann. § 39-11-106(5)(B); State v. Albert King, C.C.A. No. 01C01-9301-CC-00042, Hickman County (Tenn. Crim. App., Nashville, Dec. 30, 1993); State v. Larry G. Bond, C.C.A. No. 02C01-9105-CR-00084 (Tenn. Crim. App., Jackson, July 22, 1992), perm. to appeal denied (Tenn. 1992).

With regard to discovery, she stated that she did not file a motion for discovery because she had open-file discovery from the assistant district attorney general prosecuting the case. In fact, she even had access to the State’s notes from the grand jury proceedings. Moreover, at the time of the guilty plea, the case had not yet been set for trial. Auer testified that the Petitioner never asked her to file a motion to suppress his statement to police. According to Auer, the Petitioner never raised the issue that his statement was not voluntary.

Auer stated that she investigated the case as fully as she could. She attempted to convince the prosecutor to allow the Petitioner to plead to aggravated robbery, but to no avail. She informed the Petitioner that if he proceeded to trial and chose to testify, his prior convictions could be used to impeach him. Auer testified that the Petitioner never indicated that he wanted to proceed to trial. Given the strength of the State’s case, she negotiated a plea agreement whereby the Petitioner would plead guilty to especially aggravated

robbery but receive the minimum sentence in his range, fifteen years. In addition, the Petitioner's CAPP sentence would not be increased upon revocation. The fifteen-year robbery sentence was to run consecutive to the three-year CAPP sentence, resulting in an effective term of eighteen years. The Petitioner understood and agreed to these terms.

On cross-examination, Auer stated that she met with the Petitioner more than once but fewer than ten times. At their meetings, they discussed the Petitioner's version of the offense, the facts she had learned the State was prepared to present, and the problem of having his CAPP sentence revoked. She admitted that she never interviewed the arresting officer. She reiterated that the Petitioner admitting beating the victim and throwing him out of the car. Auer testified that the State provided her with copies of the Petitioner's statement to police. She denied ever telling the Petitioner that he would be convicted regardless of filing a motion for discovery.

After considering the evidence presented at the post-conviction hearing, the trial court dismissed the petition. In short, the trial court did not find the Petitioner's testimony to be persuasive and instead accredited Julia Auer's testimony in all respects. The trial court noted that the transcript of the guilty plea proceeding revealed that the Petitioner understood his rights and voluntarily pleaded guilty. The Petitioner indicated that his guilty plea was not the product of coercion. The trial court also emphasized that the case had not been set for trial as of the date the Petitioner entered his plea. As a result, the Petitioner's decision could not have been influenced by any pressure of having to decide to plead guilty or proceed to trial that day. Accordingly, the trial court concluded that

Auer's representation fell within the range of competence demanded of attorneys in criminal cases and denied the petition. It is from the order of denial that the Petitioner now appeals.

In determining whether or not counsel provided effective assistance at trial, the court must decide whether or not counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). To succeed on a claim that his counsel was ineffective at trial, a petitioner bears the burden of showing that his counsel made errors so serious that he was not functioning as counsel as guaranteed under the Sixth Amendment and that the deficient representation prejudiced the petitioner resulting in a failure to produce a reliable result. Strickland v. Washington, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984); Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). To satisfy this second prong the petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

When reviewing trial counsel's actions, this court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel's alleged errors should be judged at the time it was made in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper, 849 S.W.2d at 746.

This two part standard of measuring ineffective assistance of counsel also applies to claims arising out of the plea process. Hill v. Lockhart, 474 U.S. 52 (1985). The prejudice requirement is modified so that the petitioner “must show that there is a reasonable probability that, but for counsel’s errors he would not have pleaded guilty and would have insisted on going to trial.” Id. at 59.

We note that under the law applicable to the case sub judice, a petitioner bears the burden of proving the allegations in his or her petition by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings of the trial court in post-conviction hearings are conclusive on appeal unless the evidence preponderates against them. See State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983).

Applying the Strickland standard to the case sub judice, we believe that the Petitioner has failed to establish that defense counsel’s representation at the guilty plea proceeding was constitutionally deficient. The Petitioner testified at the post-conviction hearing that defense counsel failed to file appropriate motions, failed to investigate the victim’s injuries adequately and failed to communicate with him. In contrast, defense counsel Julia Auer’s testimony, accredited by the trial court, indicates that the Petitioner’s claims lack merit.

With respect to the failure to file a discovery motion, Auer testified that she had the benefit of open-file discovery from the prosecutor. She did not file a motion to suppress the Petitioner’s statement to police because the Petitioner never raised the issue that his statement was not voluntary. With respect to her

investigation of the extent of the injuries to the victim, Auer stated that the police reports provided to her by the State revealed that the victim was struck with a beer bottle and that the injuries were severe. In fact, at the post-conviction hearing, the Petitioner even admitted that he knew the victim's wounds were severe because he had stayed in an adjoining room at the hospital following the wreck of the victim's car. With respect to the communication between defense counsel and the Petitioner, Auer testified that she met with the Petitioner more than once but less than ten times. At those meetings, they fully discussed the Petitioner's version of the offense, the evidence which defense counsel had learned the State intended to offer, and the status of the CAPP sentence. Defense counsel informed the Petitioner of her opinion of the strength of the State's case.

After hearing all of the evidence and evaluating credibility, the trial court accredited the testimony of defense counsel, Julia Auer. The trial court was in a much better position to evaluate the credibility of the witnesses than this Court. We cannot conclude that the evidence preponderates against the trial court's findings. From the record before us, we believe the Petitioner has not established either deficient representation on the part of defense counsel or prejudice.

For the reasons set forth in the discussion above, we conclude that the Petitioner has failed to demonstrate that the trial court erred in denying the petition for post-conviction relief. We therefore affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

THOMAS T. WOODALL, JUDGE